A

BENGJAYA SDN BHD

v.

MOHD FAUZI AHMAD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
HUE SIEW KHENG J
[APPLICATION FOR EXECUTION NO: 36-4-2010]
9 APRIL 2012

C ***LAND LAW:*** *Sale of land - Order for - Writ of seizure and sale - Validity of - Whether validity extended - Whether O. 46 r. 6(1) and (2) of Rules of the High Court 1980 applicable*

LAND LAW: *Sale of land - Order for - Prohibitory order (PO) - Whether PO entered pursuant to s. 335 National Land Code*

D

The execution creditor (EC) applied *via* encl. 36 pursuant to O. 46 and O. 47 of the Rules of the High Court 1980 ('RHC') read together with ss. 334 and 339 of the National Land Code ('NLC') for an order for sale of the execution debtor's ('ED') E property. The application was based on an amended order for assessment of damages granted by the learned Registrar ordering the ED to pay *inter alia* RM2,000,000 being the loss on the value of the EC's property. The ED had objected to the application but in its submission before the learned judge did not submit on the F objections raised but submitted on new issues namely: (i) the writ of seizure and sale (WSS) was not valid as required under O. 46 r. 6 of the RHC; (ii) the EC failed to show that the Prohibitory Order had been obtained in accordance with s. 335 of the NLC and O. 47 r. 7(a) of the RHC; therefore the property is deemed G not seized under O. 47 r. 6(3) of the RHC; and (iii) the amount of the alleged debt is much lesser than the asking reserved price hence leviable by charge or lease or sale of a portion only or sale of any other property of the ED.

H **Held (allowing application):**

(1) There was no need for the EC to file an application for renewal of the WSS as the property was seized on 11 June 2010 when the PO was duly presented and registered in the I Kuala Lumpur Land Office. The validity of the WSS and the PO had been extended to 11 November 2011 and the writ of seizure and sale was valid at the time of the filing of the application. Order 46 r. 6(1) and (2) of the RHC only applies when the writ had not been wholly executed. (para 8)

(2) The ED had not applied under O. 47 r. 7(c) for a postponement of the sale to raise the amount leviable under the writ by charge or lease, or sale of a portion only of the immovable property seized. Hence there was no merit in the contention that the alleged debt is much lesser than the asking reserved price. (para 8)

Case(s) referred to:
Meenambal v. Tan Kee Chong [1934] 1 LNS 48 HC ***(foll)***
Syarikat Palaykat Madras v. Asgar Ali Fakhruddin Kagdi [1998] 1 LNS 582 HC ***(foll)***

Legislation referred to:
National Land Code, ss. 334, 335, 336, 337, 338, 339
Rules of the High Court 1980, O. 46 rr. 6(1), (2), O. 47 rr. 6(3), 7(a), (c)

For the plaintiff/execution creditor - Selena Kong (Raymond Mah with her); M/s Mah Weng Kwai & Assocs
For the defendants/execution debtors - Anas Fauzi; M/s M Raman & Assocs

Reported by Sandra Malani Gabriel

JUDGMENT

Hue Siew Kheng J:

[1] Enclosure 36 is the execution creditor's (EC) application for an order for sale of the execution debtor's (ED) property held under GRN 525 of Lot 54857 Mukim Kuala Lumpur.

The application is filed pursuant to O. 46 and 47 of the Rules of the High Court 1980 (RHC) read together with ss. 334 to 339 of the National Land Code (NLC).

Brief Background

[2] Pursuant to an amended order for assessment of damages dated 4 August 2009, the learned registrar had ordered the ED to pay, *inter alia*, the sum of RM2,000,000 to the EC being the loss on the value of the EC's property.

[3] The ED in objecting to the application, had averred, *inter alia*, the following:

(i) the EC has failed to prove its loss and damages suffered as a result of the ED's wrongful caveat.

(ii) the amended order from assessment of damages is invalid as the learned SAR was not entitled to grant interest at the rate of 8% per annum on the damages she had assessed.

(iii) the ED have two pending appeals in the Court of Appeal against the orders of the High Court allowing the EC's applications to amend the order for assessment of damages, the Writ of Seizure and Sale (WSS) and the Prohibitory Order (PO).

[4] However in submissions before me, learned counsel for the ED did not submit on the objections raised but had submitted on the following new issues:

(i) The EC is seeking to execute the WSS which is no longer valid as required under O. 46 r. 6 of the RHC.

(ii) The EC has failed to show that the PO obtained against the subject property has been entered in accordance with s. 335 of the NLC and did not comply with O. 47 r. 7(a) of the RHC and the subject property is not even deemed to have been seized under O. 47 r. 6(3) of the RHC.

(iii) The alleged debt amount is much lesser than the asking reserve price and therefore it is leviable by charge or lease, or sale of a portion only of the subject property or by sale of any other property of the ED.

[5] Learned counsel for the EC is vigorously objecting to these new issues being raised. A further affidavit was allowed to be filed by the EC to rebut the ED's contention that the PO has not been entered in accordance with s. 335 of the NLC, wherein a copy of the land search of the ED's property held under GRN No. 52509 Lot No. 54857 was exhibited to prove that the PO has been duly registered in the Kuala Lumpur Land Office.

[6] In any event, learned counsel for the EC contends, the ED should not be allowed to resile from their earlier stand that these execution proceedings are regular as they had never in their affidavits averred to the irregularity or invalidity of the execution proceedings.

[7] Whilst the EC has deposed affirmatively in its affidavits that the Writs of Execution (the WSS and PO) are valid and have been validly extended the ED have not specifically rebutted these positive averments of the EC.

[8] I concur with the submission of learned counsel for the EC that the contentions of the ED that these execution proceedings are invalid cannot be sustained. The reasons are as follows. A

(i) There is no need for the EC to file an application for renewal of the WSS as the said property was seized on 11 June 2010 when the PO was duly presented and registered in the Kuala Lumpur Land Office. Order 46 r. 6(1) and (2) the Rules of the High Court applies only when the writ had not been wholly executed, which is not the case here. B

As was held in *Syarikat Palaykat Madras v. Asgar Ali bin Fakhruddin Kagdi* [1998] 1 LNS 582: C

> The mode of seizing immovable property of a judgment debtor under a writ of seizure and sale in civil suit is by registering under the Registration of Deeds Ordinance (Chapter 121) and Order of Court. D

In *Syarikat Palaykat* the court had referred to, *inter alia*, an earlier case (*Meenambal v. Tan Kee Chong* [1934] 1 LNS 48) which held that a Writ of Seizure and Sale so far as it affected immovable property is executed by the Sheriff as soon as the order attaching the interest of the judgment debtor is registered and notice given to him and it is immaterial whether or not the seizure is completed by the sale of the property seized. E F

Jeffrey Tan J (as he then was) in *Syarikat Palaykat* observed:

> Both cases were under the old civil procedure. Yet, nothing has changed after all these years. Seizure of immovable property is still effected by registering a court order - Order 47 rule 6 of the Rules of the High Court 1980 provides that the seizure of any immovable property or any registered interest therein "shall be made by an order prohibiting the judgment debtor from transferring, charging or leasing such property and interests" but that such immovable property [10] or registered interest shall not be deemed to have been seized until such prohibitory order shall have been registered at the Registry of Titles or Land Office whereat the land or interest in land specified in such order is registered. A writ of seizure and sale is still renewable - Order 46 rule 6 provides for the extension of the validity of a writ of seizure & sale that "has not been wholly executed". G H I

Further on in his judgment, he elucidated as follows:

> But what is "seizure not completed or carried into effect"? Obviously, where nothing has been seized, then the writ of execution has not been executed. By the same reasoning, where anything has [11] been seized, then the writ of execution has been wholly executed, and where not everything has been seized, then the writ of execution has not been wholly executed. And that writ of execution not wholly executed is only required to be extended, not otherwise, if any further property of the judgment debtor is to be seized in execution, after 12 months from the date of the issue of the writ. With regard to the property already seized, and in all other cases where the execution process has commenced within 12 months, the validity of the writ execution, like the validity of a summons that has been served but yet not adjudicated, is no longer an issue.

Applying the principles laid down in the cited cases, I find the WSS valid at the time of filing this application and exh. "MFY3" of the EC's affidavit in support shows the validity of the WSS and the PO have been extended to 11 November 2011. The ED's contention that the WSS had lapsed before this application was filed cannot be sustained.

(ii) Similarly the argument that the PO was not duly registered is baseless as the contrary is evidenced by exh. "MFY5" of the affidavit in support and exh. "SK2" which show that the Prohibitory Order was duly presented and registered in the Kuala Lumpur Land Office on 11 June 2010.

(iii) As for the contention that the alleged debt amount is much lesser than the asking reserve price and hence leviable by charge or lease, I find that this contention merits no consideration as the ED have not, at any time before the filing of this application, applied under O. 47 r. 7(c) of the RHC for postponement of the sale to raise the amount leviable under the writ by charge or lease, or sale of a portion only, of the immovable property seized. I see no reason why this court should lend its aid to an indolent litigant.

[9] In view of the foregoing, I am of the firm view that the ED's objections to encl. 36 are without merit and cannot be sustained. Order in terms of encl. 36 was granted.